92-304

No. 92-_____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

NEW YORK STATE SCHOOL BOARDS ASSOCIATION,
Petitioners,

v.

THOMAS SOBOL, AS COMMISSIONER OF EDUCATION, NEW YORK STATE BOARD OF REGENTS, AND THE NEW YORK STATE EDUCATION DEPARTMENT, IN THEIR OFFICIAL CAPACITY,
Respondents.

Petition for Writ of Certiorari to the New York State Court of Appeals

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QUESTION PRESENTED

1. Did the New York State Court of Appeals err in holding that a regulation of the New York State Commissioner of Education which requires public school districts to appoint representatives from religious organizations to state-mandated AIDS curriculum advisory councils, solely on the basis of standing as a member of the religious community, does not violate the Establishment Clause.

PARTIES TO THE PROCEEDINGS

The names of all the parties to the proceeding in the court below appear in the caption of the case.

The New York State School Boards Association is a not-for-profit corporation, with no parent company or subsidiaries.

Pursuant to New York State Executive Law §71, the New York State Attorney General appeared in support of the constitutionality of the contested regulation.

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No. _____

NEW YORK STATE SCHOOL BOARDS ASSOCIATION,
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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The opinion of the New York State Court of Appeals is reported as New York State School Bds. Assn. v. Sobol, 79 NY2d 333 (1992). The decision and order of the Supreme Court - Appellate Division

Third Department is reported as New York State School Bds. Assn. v. Sobol, 168 AD2d 188 (1991). The memorandum decision and order of Supreme Court, Albany County, denying summary judgment are unreported.

JURISDICTION

The New York State Court of Appeals issued its decision on March 31, 1992 and entered on April 2, 1992. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

The Establishment Clause of the first amendment of the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

U.S. Const. amend. I.

The New York State Commissioner of Education Regulation on health education is set forth in Appendix E (App. 75a).

STATEMENT OF THE CASE

This is a case about the state-mandated participation of representatives from religious organizations in a public school's curriculum development and implementation process, based solely on their standing as representatives of the religious community.

Effective January 6, 1988, respondent Sobol, as New York State Commissioner of Education, promulgated a health education regulation providing for public school instruction on acquired immune deficiency syndrome (AIDS). The regulation also mandates that public school districts throughout the state each establish an AIDS advisory council

"responsible for making recommendations concerning the content, implementation and evaluation of an AIDS instruction program", and to appoint thereto "...community representatives, including representatives from religious organizations". (8 NYCRR 135.3(b)(2); (c)(2)). Religious representatives are the only community representatives specifically targeted by the regulation.

Petitioners seek a declaration that the state-mandated inclusion of religious representatives on AIDS advisory councils violates the Establishment Clause.

A. Statement of Facts

Respondents are statutorily charged with the responsibility of promulgating and implementing rules and regulations for the management and supervision of all public schools in New York State.

Petitioner is a not-for-profit corporate instrumentality of the public school districts of the State of New York created pursuant to Section 1618 of the New York State Education Law. Petitioner commenced the present action pursuant to a unanimous resolution from its Delegate Assembly directing the introduction of legislation to modify the composition of the AIDS advisory councils or initiation of litigation to contest the validity of the regulations.

B. Course of Proceedings

Petitioner commenced the present action in New York State Supreme Court, Albany County, on June 28, 1989, in its capacity as representative of the interests of its members, and at the direction of its Delegate Assembly. The parties to the action stipulated as to

the absence of material facts in dispute, and petitioner moved for summary judgment on the issue that the state-mandated inclusion of representatives from religious organizations in public school AIDS advisory councils violates the Establishment Clause. Specifically, petitioner argued that the composition of the AIDS advisory councils, as dictated by the regulation, conveys a message of endorsement of religion and fosters excessive entanglement between church and state. The respondents cross-moved for summary judgment.

On May 3, 1990, Supreme Court, Albany County, denied petitioner's motion for summary judgment. Citing Bowen v. Kendrick, 487 U.S. 589 (1988), Albany County Supreme Court ruled that "[a]ny effect created by the regulatory mandate

of advancing religion is 'incidental or remote'". It further determined that the regulation did not foster excessive entanglement between church and state because the "monetary expenditures and the oversight required" in Aguilar v. Felton, 473 U.S. 402 (1985), do not exist in the present situation. App. 63a-74a.

Petitioner appealed to the Supreme Court - Appellate Division Third Judicial Department. On June 6, 1991, that court affirmed the denial of summary judgment against petitioner. New York State School Bds. Assn. v. Sobol, 168 AD2d 188 (1991). (App. 53a-62a).

Citing Bowen v. Kendrick, supra, the Appellate Division determined that the regulation does not advance religion because its intent is:

> that advisory councils consist of a broad spectrum of community members,

> and the reference to religious organizations reflects at most [respondents'] considered judgment that religious organizations can help solve the problem to which the regulation is addressed. 168 AD2d at 190. (App. 56a-57a).

In addition, and again citing Bowen, the Appellate Division ruled petitioner's argument that:

> interaction between secular and religious personnel on the council will lead to the introduction of religious matters in the secular subject of school curriculum...is speculative at best [for] there is no basis for assuming that [religious] representatives are not capable of carrying out [the secular function assigned to them] under the regulation in a lawful, secular manner. 168 AD2d at 191. (App. 59a-60a).

Petitioner appealed to the New York State Court of Appeals. On March 31, 1992, that court, in a majority opinion, affirmed the two lower court orders that the regulation does not violate the Establishment Clause. New York State

School Bds. Assn. v. Sobol, 79 NY2d 333 (1992). (App. 1a-29a).

According to the Court of Appeals' majority, the regulation does not violate the Establishment Clause because the mandated inclusion of representatives from religious organizations in the AIDS councils represents a sensible means of securing "greater societal consensus and, therefore, greater secular effectiveness" in the area of AIDS education. (79 NY2d at 340). (App. 20a). Furthermore, the advisory nature of the AIDS councils renders any benefit to religion secondary and incidental in nature. (Id., at 340-341). (App. 21a-22a). In addition, the Court of Appeals majority determined the regulation does not foster excessive entanglement between church and state because "the ongoing monitoring and

supervision required in connection with the administration of financial regulations is not implicated here, and religious institutions are not exercising any discretionary governmental functions in this case." Id., at 342. (App. 27a). Also, the predominant presence of secular members in the councils would prevent any religious input from the representatives of the religious community from rising to the level of excessive entanglement. (Id. at 343). (App. 28a).

REASONS FOR GRANTING THE WRIT

This case presents the question whether a state can constitutionally mandate its public school districts to enlist the participation of religious representatives in the public school curriculum development and implementation process, simply by virtue of their

standing as members of the religious community.

Petitioner recognizes that the participation in public school matters of qualified individuals, who just happen to be religiously affiliated, does not, in and of itself, offend the constitutional principle of separation of church and state. However, respondents' regulation requires and guarantees the participation of representatives from religious organizations in all public school AIDS advisory councils, solely on the basis of religious affiliation. Furthermore, religious organizations are the only "community group" guaranteed representation under the regulation.

The New York State Court of Appeals majority decision upholding the regulation, conflicts with this Court's

Establishment Clause jurisprudence, most recently revisited in Lee v. Weisman, 60 U.S.L.W. 4723 (6/24/92), which prohibits government from favoring both religion over nonreligion, and one religion over another. (School District of the City of Grand Rapids v. Ball, 473 US 373, 382 (1985)). It also conflicts with this Court's decision in Bowen v. Kendrick, supra, because, unlike Bowen, it upholds governmental action which mandates the participation of representatives from religious organizations in government endeavors, solely on the basis of their standing as members of the religious community. Thus, if the New York State Court of Appeals majority decision is permitted to stand, it will have the effect of improperly broadening this Court's decision in Bowen.

Therefore, this Court should grant the petition for certiorari.

I. THE DECISION OF THE NEW YORK STATE COURT OF APPEALS UPHOLDING THE REGULATION AT ISSUE IS IN CONFLICT WITH THIS COURT'S ESTABLISHMENT CLAUSE JURISPRUDENCE.

This Court's Establishment Court jurisprudence is grounded on the recognition that:

> in the hands of government, what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. Lee v. Weisman, supra at 4726.

To ensure that government action does not effectuate such an outcome, this Court's decisions require that government action "maintain a course of neutrality among religions and between religion and nonreligion" (Grand Rapids, supra, at 382). However, as noted by the New York State Court of Appeals dissent, that court's majority decision upholding the

regulation violates this neutrality requirement. (79 NY2d 345-348) (Titone, J., dissenting). (App. 36a-51a).

In reviewing separation of church and state issues, this Court's decisions reflect a "delicate and fact-sensitive" application of the tripartite test set forth in Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971), for reviewing separation of church and state issues. (Lee, supra, at 4725, 4748). Under Lemon, government action will fail scrutiny if it lacks a secular purpose, has a primary effect which advances or inhibits religion, or fosters excessive entanglement between church and state.

The regulation herein clearly fails the second and third prong of Lemon. It has the primary effect of advancing religion by communicating a message of

endorsement of religion, and it fosters excessive entanglement between church and state. First, the regulation guarantees the participation of representatives from religious organizations, as a class, but fails to confer this benefit on any other "community group". As noted by the New York State Court of Appeals dissent:

> [t]he unmistakable message is that the views of religious leaders enjoy a favored status and that relevant secular viewpoints, such as those of psychologists, social workers, and business leaders are of substantially less significance. The 'endorsement' of religion, as distinguished from 'nonreligion' could not be clearer. 79 NY2d at 345-346 (Titone, J. dissenting). (App. 37a-39a).

As further noted by the dissent, this message is not less substantial because boards of education may reject the recommendations of the AIDS councils.

> Plainly, if a regulation directed all public school principals to consult with the parish priests or a

> local rabbi before developing a history or science curriculum, few would dispute that the Establishment Clause had been violated. Yet, that is precisely the import of the regulations at issue here. 79 NY2d at 346-347 (Titone, J., dissenting). (App. 42a-43a).

Second, as acknowledged by the New York State Court of Appeals' dissent, the regulation places boards of education in the unavoidable position of violating this court's requirement that government maintain denominational neutrality. (Id., at 348). (App. 49a-50a). While the regulation does not limit the number of positions available in the AIDS councils, not to recognize that the number of possible seats is necessarily finite would be formalistic. But the "law reaches past formalism," Lee, supra at 4727, and the reality remains that the regulation forces school authorities to make choices not only between religious

and non-religious organizations, but also among religions. (79 NY2d at 346, fn 2 (Titone, J., dissenting). (App. 40a-41a).

> Some religions will be singled out for the favored status of committee membership, while others will necessarily be excluded." Id., at 348. (App. 50a).

In addition, while boards of education need not reject AIDS council recommendations which merely coincide with religious precepts, (see, Bowen, supra), the regulation nonetheless forces school boards to determine whether the advice offered by the councils does unconstitutionally advance religious precepts. The making of such an inquiry, regardless of its outcome, further fosters excessive entanglement between church and state in violation of the Establishment Clause.

This Court's Establishment Clause decisions have endeavored to "prevent, as far as possible, the intrusion of [church and state] into the precincts of the other." Lemon, supra at 614. In the public school context, the court has pursued this goal with grave sensitivity. (Lee, supra at 4726, 4728; County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, fn 8 (1989); School District of the City of Grand Rapids v. Ball, supra; Edwards v. Aguillard, 482 U.S. 578, 584 (1987)). The New York State Court of Appeals majority decision is in conflict with this pursuit.

II. THE DECISION OF THE NEW YORK STATE COURT OF APPEALS UPHOLDING THE REGULATION AT ISSUE IS IN CONFLICT WITH THIS COURT'S DECISION IN BOWEN V. KENDRICK.

Unlike the two lower courts, the New York State Court of Appeals majority did not rely on Bowen v. Kendrick, 487 U.S. 589, in its affirmance of the regulation at issue here. As noted by the dissent, both cases are factually inapposite each other. (79 NY2d at 347, fn 3). (App. 44a-46a). Indeed, for this very reason the Court of Appeals should have found the regulation invalid. Instead, the majority opinion of the New York Court of Appeals operates to expand this Court's holding in Bowen beyond constitutional limits.

Integral to this Court's decision in Bowen was a determination that the services provided under the legislation

reviewed there were not the exclusive responsibility of government to render, and that government alone could not meet the objectives of the legislation. In addition, the participation of religious organizations was optional, rather than mandatory, and, religious institutions did not enjoy any greater privileges than those afforded other relevant community groups.

In contrast, the regulation here concerns the design, implementation, and evaluation of a public school curriculum, a strictly governmental function which government can meet alone. In addition, the regulation mandates the participation of religious representatives in said process. Furthermore, although the regulation requires the appointment of "parents, school board members,

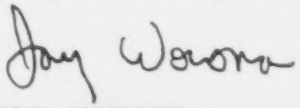
appropriate school personnel and community representatives," religious organizations are the only "community group" guaranteed representation under its provisions. Therefore, as observed by the New York State Court of Appeals dissent, religious organizations enjoy greater participatory privileges than other community groups. (79 NY2d at 346 (Titone, J., dissenting). (App. 39a-40a).

Thus, the regulation herein cannot be upheld in light of this Court's decision in Bowen, and accordingly, it should have been found constitutionally infirm.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,



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July 27, 1992

APPENDIX

PUBLISHED

STATE OF NEW YORK

COURT OF APPEALS

New York State School Boards Association,

Appellant,

v.

Thomas Sobol, as Commissioner of Education, et al.,

Respondents.

Argued: February 19, 1992

Decided: March 31, 1992

Appeal, on constitutional grounds, from an order of the Appellate Division of the Supreme Court in the Third Judicial Department, entered June 6, 1991, which modified, on the law, and, as modified,

affirmed an order of the Supreme Court (Daniel H. Prior, Jr., J.), entered in Albany County, denying a motion by plaintiff for summary judgment, granting a cross motion by defendants for summary judgment, and dismissing the complaint. The modification consisted of reversing so much of the order of Supreme Court as dismissed the complaint, and declaring that 8 NYCRR 135.3 does not violate the Establishment Clause (US Const 1st Amend) by requiring the inclusion of representatives from religious organizations on State-mandated AIDS advisory councils.

APPEARANCES OF COUNSEL

Jay Worona and Pilar Sokol for appellant.

Elizabeth R. Koepcke, Lizette A. Cantres and Robert Abrams, Attorney-General

(Daniel Smirlock of counsel), for respondents.

Stanley Geller for Public Education and Religious Liberty, amicus curiae.

Deborah Goldberg, Donna Lieberman, Arthur N. Eisenberg, Laurie R. Rockett, William B. Rubenstein, of the Pennsylvania and District of Columbia Bars, admitted pro hac vice, Ruth E. Harlow and Janet Benshoof for New York Civil Liberties Union and others, amici curiae.

OPINION OF THE COURT

BELLACOSA, J.

Plaintiff New York State School Boards Association (Association) appeals as of right on Establishment Clause constitutional grounds (US Const 1st Amend). The Appellate Division order upheld the State Education Department regulations which mandate the inclusion

of "representatives from religious organizations" on advisory councils in public school development of education and instruction programs to combat the epidemic of Acquired Immune Deficiency Syndrome (AIDS). The key sentence and challenged clause of the regulations directs: "The advisory council shall consist of parents, school board members, appropriate school personnel, and community representatives, including representatives from religious organizations" (8 NYCRR §§135.3[b]; [2] and [c][2] [emphasis added]). We agree with the two courts below that the regulations, as facially challenged, meet the guidelines established by the United States Supreme Court in Lemon v. Kurtzman (403 US 602) and do not violate the

Establishment Clause. We therefore affirm.

In 1977, the Legislature authorized respondent, State Commissioner of Education ("Commissioner"), to "prescribe in regulations such health education courses *** as *** may [be] deem[ed] necessary and desirable for the welfare of pupils and the community" (Education Law §804[4]). In 1987, the Commissioner promulgated regulations (eff Jan. 6, 1988) requiring all elementary and secondary schools to provide AIDS instruction to schoolchildren (8 NYCRR §§135.3[b]; [2] and [c][2]). The instruction is to be "age appropriate and consistent with community values." (id.). The regulations express mandated goals: to "provide accurate information to pupils concerning the nature of the

disease, methods of transmission, and methods of prevention." (id.). The instruction must "stress abstinence as the most appropriate and effective premarital protection against AIDS." (id.). Students, with parental permission, may "opt out" of the school instruction, provided assurance is given that they will receive instruction at home. The local boards of education or trustees are responsible for formulating the content of the instruction and approving and evaluating its implementation. In public schools, the boards and trustees are required to establish advisory councils to make recommendations regarding the content, implementation and evaluation of the instruction. The mandated composition of the advisory councils reflects a desire

for broad and early community input, coupled with the objective of avoiding student "opt outs" from the ultimately adopted education program, thus reaching the greatest number of pupils with accurate, effective information.

The Association sues for declaratory judgment that the regulations violate the Establishment Clause of the First Amendment of the United States Constitution (US Const 1st Amend). It urges facial unconstitutionality of the regulations, and does not advance, develop or urge an "as applied" unconstitutionality argument. The record is barren of any evidence describing the manner in which the regulations are being implemented in the myriad of school districts throughout the State.

Supreme Court, Albany County, applying the still-governing tripartite test of Lemon v. Kurtzman (403 US 602, supra; see, Matter of Klein [Hartnett], 78 NY2d 662, 666), granted the Commissioner's cross motion for summary judgment. The Appellate Division technically modified, agreeing substantively with Supreme Court that the regulations passed facial constitutional muster (168 AD2d 188). Those courts concluded that the regulations properly reflect that "representatives from religious organizations" have some role to contribute in addressing the AIDS epidemic, and that the challenged portion of the regulations has only an incidental and remote, not primary, effect on the advancement of religion. Those courts emphasized the advisory nature of the

councils in rejecting the Association's argument that the regulations created a symbolic link between religion and state, and rebuffed the Association's excessive entanglement theory as speculative.

The Establishment Clause of the First Amendment states that "Congress shall make no law respecting an establishment of religion" (US Const 1st Amend). These first words of the Bill of Rights, ratified just over 200 years ago, have deep roots in this Nation's history of religious freedom, diversity and tolerance. The evolution of the Establishment Clause has been traced fully in several United States Supreme Court decisions (see, Engel v Vitale, 370 US 421, 425-430; Everson v Board of Educ., 330 US 1, 8-14; see also, Edwards v Aguillard, 482 US 578, 605 [Powell, J.,

concurring]; Wallace v Jafree, 472 US 38, 93-106 [Rehnquist, J., dissenting]). Everson v Board of Educ. (supra) summarizes the "essential precepts" of the Establishment Clause, which applies to the States under the Fourteenth Amendment, as follows:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence * * * person[s] to go to or remain away from church against [their] will or force [them] to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups

and vice versa." (330 US 1, 15-16, supra.)

The Establishment Clause, then, has emerged as "more than a pledge that no single religion will be designated as a state religion * * * [or] a mere injunction that governmental programs discriminating among religions are unconstitutional. * * * [I]nstead, [it] primarily proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" (Grand Rapids School Dist. v Ball, 473 US 373, 381.)

In recent years, the United States Supreme Court has recognized that total separation between government and any governmental acknowledgment of the role of religion in citizens' lives is not possible or desirable, and would in fact exhibit hostility rather than a

constitutionally correct neutrality towards religion (see, Lynch v Donnelly, 465 US 668, 672-673; Lemon v Kurtzman, 403 US 602, 614, supra; see also, Allegheny County v Greater Pittsburgh Am. Civ. Liberties Union, 492 US 573, 623 [O'Connor, J., concurring]; Aguilar v Felton, 473 US 402, 420 [Burger, Ch. J., dissenting]). Thus, in general, and especially on a facial challenge, so long as the government "maintain[s] a course of neutrality among religions, and between religion and nonreligion" (Grand Rapids School Dist. v Ball, 473 US 373, 382, supra), its actions will withstand Establishment Clause scrutiny.

Drawing on these general principles and the "cumulative criteria developed by the Court over many years," the United States Supreme Court in Lemon v Kurtzman

(403 US 602, 612, supra) prescribed its tripartite "test" for evaluating the constitutionality of governmental action under the Establishment Clause; first, the action must have a secular purpose; second, it must not have a principal or primary effect that advances or inhibits religion; third, it must not foster excessive governmental entanglement with religion (id., at 612-613). Although characterized as a "test", the United States Supreme Court has cautioned that the Lemon criteria " 'must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines' " or " 'helpful signpost[s].' " (Grand Rapids School Dist. v Ball, 473 US 373, 383, supra, quoting Meek v Pittenger, 421 US 349, 359; Lynch v Donnelly, 465 US 668, 679,

supra; Mueller v Allen, 463 US 388, 394, quoting Hunt v McNair, 413 US 734, 741). Indeed, individual Justices of the United States Supreme Court have expressed varying viewpoints on the continued utility and vitality of the Lemon test (see, Allegheny County v Greater Pittsburgh Am. Civ. Liberties Union, 492 US 573, 625, supra [O'Connor, J. concurring]; Edwards v Aguillard, 482 US 578, 636-640, supra [Scalia, J., dissenting]; Aguilar v Felton, 473 US 402, 419, supra [Burger, Ch. J., dissenting]; Wallace v. Jaffree, 472 US 38, 68-69 [O'Connor, J., concurring], and 113 [Rehnquist, J., dissenting], supra; Lynch v. Donnelly, 465 US 668, 687-689, supra [O'Connor J., concurring]; see also, Lee v Weisman, ___US ___ [No. 90-1014, argued Nov. 6, 1991 (60 USLW

3351)]). Nevertheless, we are unanimous that the Lemon analysis persists as the governing precedent and guide in this area (see, Bowen v Kendrick, 487 US 589, 602, quoting Mueller v Allen, 463 US 388, 394, supra; Matter of Klein [Harnett], 78 NY2d 662, 666, supra).

The United States Supreme Court has "particularly relied on Lemon in every case involving the sensitive relationship between government and religion in the education of our children", a point strongly emphasized by appellant Association (Grand Rapids School Dist. v Ball, 473 US 373, 383 supra; see, Edward v Aguillard, 482 US 578, 584, supra). In this context, we proceed to examine and apply the Lemon test to the challenged portion of the regulations.

The Association concedes that the regulations have a secular purpose. Indeed, it is facially evident that the compelling purpose of the regulations is to acquire broad and early community input and then to disseminate accurate information about the AIDS epidemic to as many schoolchildren as possible.

The focus of appellant's sharpest and strongest attack is on the failure of the regulations to overcome the second prong of the Lemon test - that the principal or primary effect must not advance religion. A particular concern under the "effects" prong is "whether the symbolic union of church and state effected by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by

the nonadherents as a disapproval, of their individual religious choices" (Grand Rapids School Dist. v Ball, 473 US 373, 390, supra; see, Allegheny County v Greater Pittsburgh Am. Civ. Liberties Union, 492 US 573, 595-597, supra). Context determines whether particular governmental action is likely to be perceived as an endorsement of religion (see, Allegheny County v Greater Pittsburgh Am. Civ. Liberties Union, supra, at 595-597). Governmental action "endorses" religion if it favors, prefers, or promotes it (see, Edwards v Aguillard, 482 US 578, 593, supra; Wallace v Jafree, 472 US 38, 59-60, supra; Lynch v Donnelly, 465 US 668, 691, supra). The regulations do not have any of those forbidden effects, despite the

conclusory and speculative assertions in the dissenting opinion.

The Association specifically urges that the regulations unconstitutionally advance religion because they mandate representation on the public school advisory councils from among members of religious organizations while failing to list other community groups, and therefore make adherence to religion a relevant qualification to representation on the councils. The Association argues that this conveys a message of endorsement of religion and thus creates the forbidden "symbolic link" between church and State. The argument with respect to this prong does not survive analysis.

The "endorsement test" does not "preclude government from acknowledging

religion or from taking religion into account in making law and policy" (Wallace v Jaffree, 472 US 38, 70, supra [O'Connor, J., concurring]; see also, Allegheny County v Greater Pittsburgh Am. Civ. Liberties Union, 492 US 573, 625, supra [O'Connor, J., concurring]). In the context of the extremely sensitive, complex and escalating threat which society faces from AIDS - unless the broadest audience is reached as early as possible with the most accurate education program possible - it is particularly sensible for government to add the views of religious representatives on an advisory level to the predominant views it will receive from the rest of the community (see, Bowen v Kendrick, 487 US 589, 607, supra). Indeed, by including and considering the views of members of

the community who are affiliated with religious organizations, the Commissioner ensures that the AIDS instruction that is eventually adopted will more likely enjoy greater societal consensus and, therefore, greater secular effectiveness. By thus neutralizing or reducing possible objections from parents and subsequent opt-outs by schoolchildren, a more universal education program is likely to result (see, Ware v Valley Stream High School Dist., 75 NY2d 114 [involving a religious group's claim under the Free Exercise Clause to exemption from the regulations requiring AIDS instruction in schools]). Thus, the principal, primary effect of the challenged portion of the regulations is to advance rational, legitimate, educational and secular

goals, not to favor or prefer religious ones.

An important component in the analysis of the "effects" prong, which the dissenting opinion summarily dismisses (dissenting opn, at 346-347), is that the councils serve in a purely advisory role to the trustees and the boards of education, which retain the unfettered and nondelegable public responsibility and discretion to adopt or reject any advisory views in whole or in part. This feature confirms the secondary, incidental nature and effects of that aspect of the regulations which mandates that advisory council membership include persons from religious organizations (see, Bowen v Kendrick, 487 US 589, 607, 612-613, supra; Lynch v Donnelly, 465 US 668, 683, supra). In

this context, we conclude that it is not sufficiently likely that religious adherents or nonadherents would perceive from the inclusion of representatives from religious organizations on AIDS advisory councils that the State is endorsing or disavowing religion or nonbelievers. The second prong is not violated by these regulations in this respect.

The Association further argues that inclusion of community representatives from religious organizations is likely to be perceived as an endorsement of religion because the regulations fail to list other community groups as mandatory participants on advisory councils. The dissenting opinion mistakenly concludes that the regulations mandate the inclusion of "religious leaders" and

claims that such persons are given "favored status" and "greater participatory privileges" than other community representative participants on the councils (dissenting opn, at 345, 346, 348, 349). This is characterized as "preferential", "automatic access to the governmental decision-making" (dissenting opn, at 346, 347). The assertion that representatives from religious organizations are invested with a greater role than other included individuals or "community representatives" is mistaken. No hierarchy or preferential weight is established or ascribed in the regulations, and none can be inferred on this facial analysis. The mandatory list of participants on the councils includes "parents, school board members, appropriate school personnel, and

community representatives, including representatives from religious organizations." There is no fixed overall number of representatives or proportionate allocation or distribution among the categories. By requiring a cross-section of community persons and entities to contribute to the development of the AIDS instruction, without restriction or further specification, the regulations reach out to the broadest possible network of input and viewpoints. We conclude that the challenged composition of advisory councils is not sufficiently likely to give rise to a perception that the government has favored or preferred religious over nonreligious groups. The Commissioner instead has "successful[ly] maint[ained] * * * 'a course of neutrality among

religions, and between religion and nonreligion' " on the face of the promulgated regulations (Bowen v Kendrick, 487 US 589, 609 quoting Grand Rapids School Dist. v Ball, 473 US 373, 382, supra).

The Association additionally challenges the regulations as unconstitutional under the third prong of the Lemon test, arguing that they foster an excessive entanglement with religion. To evaluate this prong, courts must examine "the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority" (Lemon v Kurtzman, 403 US 602, 615, supra). The test is "inescapably one of degree" (Walz v Tax Commn., 397 US

664, 674), because some degree of entanglement between government and religion is inevitable given the complexity of modern society (see, Larkin v Grendel's Den, 459 US 116, 123; Lemon v Kurtzman, 403 US 602, 614, supra). The "excessive entanglement" concept has its genesis in a tax-exemption case (Walz v Tax Commn., supra). It has primarily been implicated in cases involving public financial aid to parochial schools, with the concomitant need for administrative interaction and ongoing supervision and monitoring to ensure the absence of a religious message (see, Aguilar v Felton, 473 US 402, supra; Lemon v Kurtzman, 403 US 602, supra; see also, Bowen v Kendrick, 487 US 589, supra). It has also been implicated in cases in which discretionary governmental powers are

delegated to or shared with religious institutions (see, Larkin v Grendel's Den, 459 US 116, 127, supra).

Obviously, the ongoing monitoring and supervision required in connection with the administration of financial aid regulations is not implicated here, and religious institutions are not exercising any discretionary governmental functions in this case.

The Association nevertheless argues that "excessive entanglement" will result when boards of education or trustees face the task of sifting through the recommendations of the advisory councils to screen out those that may represent religious dogma or tenets which could impermissibly advance religion. We agree with the Appellate Division that this argument is entirely speculative. The

recommendations that may emerge from advisory councils - not necessarily from the individuals who constitute the councils - may not include religious viewpoints as such or at all. The supposed sifting methodology is not necessary or inherent to the consideration and analysis of advisory council recommendations by the boards and trustees under the facially challenged regulations. Indeed, given the almost certainly dominant secular membership of the councils, any religious input is not likely to rise to anything approaching the required "excessive" entanglement level.

The Association alternatively argues, and the dissenting opinion seems to agree (dissenting opn, at 348), that there will be a need to choose

representatives from among many religious organizations active in a community, and that this will lead to political divisiveness and excessively entangle school boards in matters of different religions. This argument, too, has a speculative "as applied" analytical flavor and has no merit or record support.

In sum, the Association's facial constitutional challenge to the mandated inclusion of representatives from religious organizations in public school AIDS education advisory councils fails under all the Lemon prongs.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

TITONE, J. (dissenting). In recognition that education is the only

meaningful weapon society currently has to combat the spread of AIDS, the Commissioner of the State Education Department has promulgated regulations requiring all elementary and secondary schools within the State to develop courses of "appropriate instruction" on that subject as part of their health education programs (8 NYCRR 135.3 [b] [2]; [c] [2]). We have no quarrel with the Commissioner's goal of instituting a program of mandatory AIDS education, nor do we question the Commissioner's decision to implement that goal by requiring the establishment of community-based advisory councils to make "recommendations concerning the content [and] implementation" of the AIDS curriculum (id.). We do find it objectionable, however, that the

Commissioner has seen fit to require the presence of "representatives from religious organizations" on these advisory committees (see, id.). In our view, this requirement has the inevitable and primary effect of both favoring and endorsing religion and, as such, violates a "core purpose of the Establishment Clause" (Grand Rapids School Dist. v Ball, 473 US 373, 389). Accordingly, we dissent.

Initially, we do not dispute that the tripartite Lemon test (Lemon v Kurtzman, 403 US 602) is the controlling standard for measuring the constitutional validity of the regulations challenged here. Nor do we find fault with the majority's general discussion of the essential precepts of the Establishment Clause, including its acknowledgement

that the Clause proscribes not only discrimination against some denominations but also discrimination in favor of religion in general (majority opn, at 338, citing Grand Rapids School Dist. v Ball, supra). Our quarrel with the majority lies, instead, with its application of these broad principles to the particular problem raised by the challenged regulations.

Since plaintiff does not argue that the regulations have a secular purpose, we will not here pursue that aspect of the tripartite Lemon analysis. Indeed, we find little reason to explore the degree to which the religious-representative requirements of 8 NYCRR 135.3 (b) (2) and (c) (2) have a goal that is sufficiently secular to pass muster under Lemon, since, contrary to

the majority's holding, we conclude that the regulations' effect is one that is unacceptable under the second prong of the Lemon inquiry.

It is by now axiomatic that to avoid objection under the Establishment Clause a statute must have a " 'principal or primary effect * * * that neither advances nor inhibits religion' " (Mueller v. Allen, 463 US 388, 394). It is also axiomatic that government may not adopt measures which have the effect of endorsing religion, even symbolically (Grand Rapids School Dist. v Ball, supra, at 389-390). The government must "maintain a course of neutrality among religions and between religion and nonreligion" (id., at 382). Finally, the area of government educational programs for children is one where special caution

is warranted because children are highly impressionable and the symbolism of a union between church and State is likely to have a magnified impact (id., at 383, 390). When viewed in light of these principles, the challenged regulations cannot be regarded as anything other than a patent violation of the Establishment Clause.

Initially, the majority's conclusion that the regulations do not have the "primary effect" of advancing religion appears to be based in large measure on the indisputable premise that the regulations serve a useful secular purpose (see, majority opn, at 340). In this respect, its analysis is simply incomplete, since Lemon v Kurtzman (supra) and its progeny require a showing of both a legitimate secular purpose and

a "primary effect" that neither advances nor inhibits religion.

Furthermore, the majority's analysis is constricted by an overly narrow view of the problem the challenged regulations present. The central focus of the majority's opinion seems to be the degree to which the religious views of the advisory committees' religious representatives are likely to have a concrete impact on the AIDS curriculum. Indeed, the entire tenor of the majority's opinion suggests that it views the problem presented here solely as one involving a potential religious interference with school curriculum decisions (see, e.g., Epperson v Arkansas, 393 US 97; Engel v Vitale, 370 US 421). Of course, if that were the only problem, the majority's conclusion

would be unobjectionable, since as the majority states, it cannot be assumed that the religious views of the mandatorily designated committee members will necessarily find their way into the AIDS curriculum. However, as will be demonstrated below, that is only one minor aspect of the "effect" that these disputed regulations will have.

By requiring that all AIDS education advisory committees include representatives of religious organizations, the State is declaring, in most direct terms, that, above all other interested groups in society, religion has a unique and indispensable role to play on the councils of government (cf., Bowen v. Kendrick, 487 US 589, 605 [challenged legislation does not suggest "that religious institutions * * * are

uniquely well qualified to carry out [funded] services"]). The unmistakable message is that the views of religious leaders enjoy a favored status and that relevant secular viewpoints, such as those of psychologists, social workers and business leaders are of substantially less significance.[1] The "endorsement"

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[1] The majority takes us to task for referring occasionally to religious "leaders" rather than to religious "representatives" - - the term used in the regulation (majority opn, at 341). The majority's point in this regard is, at best, enigmatic. Although it is true that the regulations do not mandate that religious "leaders" be selected for service on the committees, it seems unreasonable to think that individuals who are little known or are not

recognized as "leaders" within their religious groups would be chosen as "representatives." Similarly, it would be naive to suppose that the selected "leaders" or "representatives" appointed to the committees will not at least be perceived as "representing," and therefore expressing, a religious viewpoint. Indeed, if the appointed representatives were not "leaders" in some sense and were not perceived as representing a uniquely religious perspective on the question of AIDS education, there would be no purpose to mandating the presence of "representatives from religious organizations" as a class. Certainly, the purpose the majority identifies, i.e., "neutralizing or reducing possible

of religion, as distinguished from "nonreligion," could not be clearer (see, Grand Rapids School Dist. v Ball, supra, at 382).

Furthermore, the effect of the challenged regulation goes beyond a merely symbolic endorsement of religion. By guaranteeing their leaders a seat on the schools' AIDS education advisory panels, the State has given religious adherents automatic access to the governmental decision-making - a benefit not conferred on any other group of

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objections from parents and subsequent opt-outs," (majority opn, at 340) would not be served, since the achievement of that goal depends to a large extent on the public's perception that the religious viewpoint has been taken into account.

citizens. As a consequence, religious adherents, through their representatives, are afforded greater participatory privileges, in direct violation of the fundamental neutrality principle. Indeed, the twin evils that Justice O'Connor identified in Lynch v Donnelly (465 US 668, 688 [O'Connor, J., concurring]) are directly implicated here. 8 NYCRR 135.3 (b) (2) and (c) (2) "give [religious] institutions access to government or governmental powers not fully shared by nonadherents" and, as a consequence, those regulations "foster the creation of political constituencies

defined along religious lines"[2] (id., at

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[2] The majority's assertion that religious representatives "are invested with [no] greater role than other included individuals" (majority opn, at 341) misses the point. Our concern here is not that the religious representatives have a greater voice on the committee vis-a-vis "other included individuals," but rather that religious adherents, unlike all other community members, have guaranteed representation on the committees. While it is true that there is no fixed number of positions on the AIDS advisory committees, it is also true that the number of possible committee seats is necessarily finite and that, consequently, not all of the interest groups in the community will be able to be accommodated. Thus, the legitimate

688).

Nor can it be said that the threat to the values implicit in the Establishment Clause is any less substantial because the role that religious leaders are granted is merely advisory (see, majority opn, at 340-341). Plainly, if a regulation directed all public school principals to consult with

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interest groups such as planned parenthood organizations, local drug treatment programs and child welfare advocates will have to compete for representation, while, by virtue of the challenged regulations, religious adherents are assured at least one seat. It is in this sense that the regulations confer a preference on religious adherents as a class and, for that reason alone, they are objectionable.

the parish priest or local rabbi before developing a history or science curriculum, few would dispute that the Establishment Clause had been violated. Yet, that is precisely the import of the regulations at issue here.

While it is true, as the majority notes, that the Establishment Clause does not "preclude government from * * * taking religion into account" (Wallace v Jaffree, 472 US 38, 70), it certainly does not follow that government may give religion preferential access to its decision-making ears. Nor does it follow that the Establishment Clause permits government to confer such favored status on religion over other viewpoints whenever some secular goal, such as that

identified by the majority (majority opn, at 340), is advanced.[3]

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[3] Although it has quoted from Bowen v Kendrick (487 US 589), the majority has wisely avoided adopting respondent's argument that that case is all but dispositive of the issues presented here. In fact, because the statute challenged in Bowen is so different from the statute challenged here, the Supreme Court's decision in Bowen is of little analytical import in this appeal. The statute at issue in Bowen, which authorized Federal funding for private organizations to provide " 'services and research in the area of premarital adolescent sexual relations,' " required grant applicants to describe how they will " 'involve religious and charitable organizations,' " as well as

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families and other community groups (487 US, at 593, 596). Thus, unlike in this case, the statute upheld in Bowen did not mandate that government agencies consult directly with religious representatives. Furthermore, as the Supreme Court pointedly observed, there was "no requirement * * * that grantees be affiliated with any religious denomination" and there was no "suggestion that religious institutions * * * are uniquely well qualified to carry out [the funded] services" (id., at 604-605). It is precisely those characteristics that distinguish the regulations challenged here from the statute at issue in Bowen. And, it is precisely those characteristics that render these regulations constitutionally

Indeed, in its effort to find a "primary" secular effect to satisfy the second prong of the Lemon test, the majority has, ironically, itself adopted a position that the Establishment Clause forbids.

The majority argues that mandatory involvement of representatives of religious views is desirable and has a primarily secular effect because it will ensure that the resulting product will reflect "a greater societal consensus" and will thereby "neutraliz[e] potential community opposition (majority opn, at 340). However, that is simply another way of saying that the regulations are valuable because they enable government to co-opt the view of the religious community by incorporating, or at least

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infirm.

appearing to incorporate, them in its educational programs. Once again, even this purported "secular effect" that the majority has identified as its true "primary" effect the endorsement of religion, in direct violation of the Supreme Court's prohibition in Lemon v. Kurtzman (supra, at 612-613) and Grand Rapids School Dist. v Ball (supra).

Moreover, by relying on the benefits that an alliance with religious leaders might have for government, the majority has fallen into one of the traps that are associated with governmental efforts to use religion to accomplish its own secular goals. As one commentator has noted, when the government uses religion, or religious leaders, as a tool, it is actually exploiting a "borrowed aura of * * * legitimacy," which, because of the

fundamental importance that religion holds for many people," may lend its policies an undeserved level of credibility (Tribe, American Constitutional Law § 14-15, at 1287 [2d ed]).

Yet another problem with the majority's proffered justification for upholding the regulations is its insensitivity to the feelings and opinions of those who are not religious adherents. The majority's assumption that a curriculum adopted after consultation with religious leaders will have "greater secular effectiveness" and will "neutraliz[e]" possible community opposition overlooks the fact that, in addition to religious adherents, the community includes individuals who not only do not adhere to a particular

religious view but are also opposed to educational programs that, directly or indirectly, reflect the viewpoints of religious leaders. Thus, the majority's analysis itself accomplishes precisely what Justice O'Connor cautioned against in Lynch v Donnelly (supra, at 688)- "send[ing] a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."

Finally, the majority has not explained how school districts attempting to implement the challenged regulations can avoid the other vice that often accompanies rules that give religion a preferred position, i.e., favoring one denomination over another. Since the

number of positions on the advisory boards mandated by 8 NYCRR 135.3 (b) (2) and (c) (2) is finite, school authorities will have to make choices among the leaders of the various sects in their communities. Some religions will be singled out for the favored status of committee membership, while others will necessarily be excluded. As a consequence, the principle of denominational neutrality will inevitably be violated (see, Tribe, op. cit., at 1286).

In sum, the religious-representative requirement of the Commissioner's AIDS education rules runs directly counter to the primary objective of the Establishment Clause. Individual religious leaders, like the leaders of other segments of the community,

undoubtedly have important secular contributions to make to the development of a program of AIDS education. However, when government mandates the participation of religious leaders as a class, the message is clear that what the government is seeking is a specifically religious perspective. That message represents a forbidden endorsement of religion and is inimical to the First Amendment's goal of "prevent[ing], as far as possible, the intrusion of either [Church or State] into the precincts of the other" (Lemon v Kurtzman, supra, at 614). Accordingly, we dissent.

Chief Judge Wachtler and Judges Simons, Kaye and Hancock, JR., concur with Judge Bellacosa; Judge Titone dissents and votes to reverse in a

separate opinion in which Judge Alexander concurs.

Order affirmed, with costs.

PUBLISHED

SUPREME COURT - APPELLATE DIVISION

THIRD JUDICIAL DEPARTMENT

NEW YORK STATE SCHOOL BOARDS ASSOCIATION,

Appellant,

v.

THOMAS SOBOL, as Commissioner of Education, et al.,

Respondents.

Appeal from an order of the Supreme Court (Daniel H. Prior, Jr., J.) entered June 27, 1990 in Albany County, which denied a motion by plaintiff for summary judgment, granted a cross motion by defendants for summary judgment, and dismissed the complaint with prejudice.

Argued: April 23, 1991

Decided: June 6, 1991

Decision No. 62812

Before: Mahoney, P.J., Casey, Mikoll, Yesawich Jr. and Crew III, JJ.

APPEARANCES OF COUNSEL

Jay Worona for appellant.

Lizette A. Cantres (Elizabeth R. Koepcke of counsel) and Robert Abrams, Attorney-General (Daniel Smirlock of counsel), for respondents.

OPINION OF THE COURT

Casey, J.

At issue on this appeal is whether 8 NYCRR 135.3 violates the Establishment Clause of the 1st Amendment by requiring that representatives from religious organizations be included on State-mandated AIDS advisory councils to be established by local boards of education

for the purpose of making recommendations concerning the content, implementation and evaluation of AIDS instruction programs. We hold that the regulation does not violate the Establishment Clause.

In Lemon v. Kurtzman (403 US 602), the Supreme Court held that governmental action does not violate the Establishment Clause when the action (1) has a secular purpose, (2) has as its principal or primary effect one that neither advances nor inhibits religion, and (3) does not foster excessive entanglements with religion. Plaintiff contends that the regulation at issue fails to satisfy the second and third factors of the Lemon standard. According to plaintiff, the regulation has as a primary effect the advancement of religion because it

communicates an endorsement of religion and creates a symbolic link between religion and the State. Plaintiff finds an excessive entanglement in that the regulation may require local school boards to choose which religion will be given a voice on the advisory counsel and may cause the involvement of faith or morals in a secular subject.

The regulatory scheme at issue requires local school boards to set up AIDS advisory councils made up of "parents, school board members, appropriate school personnel, and community representatives, including representatives from religious organizations" (8 NYCRR 135.3 [b] [2]; [c] [2]). It is clearly the intent of the regulation that the advisory councils consist of a broad spectrum of community

members, and the reference to religious organizations reflects at most defendants' considered judgment that religious organizations can help solve the problem to which the regulation is addressed. The Establishment Clause does not prevent defendants from making such a judgment or from recognizing that religion or religious organizations may have a role to play in resolving certain secular problems, and to the extent that this recognition advances religion, the effect is incidental and remote (see, Bowen v Kendrick, 487 US 589, 607).

As to plaintiff's symbolic link argument, the Supreme Court has said that "the mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some

by reason of the power conferred" (Larkin v Grendel's Den, 459 US 116, 125-126). Here, however, there is no "appearance of a joint exercise of legislative authority by Church and State". Representatives from religious organizations are to serve as members of an advisory council consisting of a broad spectrum of community members. The council's function is advisory only, to make recommendations. The final decision-making authority as to the content, implementation and evaluation of instructional programs remains with the local school board. Instead of creating an impermissible significant symbolic benefit to religion, the regulation reflects a recognition of the role that religious organizations have to play, along with other community members, in

helping to deal with the AIDS problem. As previously noted, such recognition has only an incidental or remote effect of advancing religion (see, Bowen v Kendrick, supra).

Plaintiff contends that the regulation violates the excessive entanglement prong of the Lemon test because the interaction between secular and religious personnel on the council will lead to the introduction of religious matters in the secular subject of school curriculum, and because political divisiveness will result as different denominations endeavor to obtain seats on the council. The political divisiveness question is inapplicable in these circumstances (see, Bowen v Kendrick, supra, at 617, n 14; Mueller v Allen, 463 US 388, 404, n 11),

and we find plaintiff's claim based upon the potential interaction between religious and secular personnel to be speculative at best. "Some limited and incidental entanglement between church and state authority is inevitable in a complex modern society" (Larkin v Grendel's Den, supra at 123). Representatives of religious organizations have been included the State-mandated AIDS advisory council to perform an essentially secular role in representing the viewpoint of various large segments of the community, and there is no basis for assuming that those representatives are not capable of carrying out their functions under the regulation in a lawful, secular manner (see, Bowen v Kendrick, supra at 612-613).

Since the parties stipulated that the only issue before Supreme Court was the constitutionality of the regulation, we will not consider the additional issue raised on appeal by plaintiff. We note that since the relief sought in this action was a declaratory judgment, Supreme Court's dismissal of the complaint after considering the merits of plaintiff's claim was inappropriate (see, Maurizzio v Lumbermens Mut. Cas. Co., 73 NY2d 951, 954).

Mahoney, P.J., Mikoll, Yesawich, Jr., and Crew III, JJ., concur.

Ordered that the order is modified, on the law, without costs, by reversing so much thereof as dismissed plaintiff's complaint; it is declared that 8 NYCRR 135.3 does not violate the Establishment Clause of the 1st Amendment by requiring

the inclusion of representatives from religious organizations on State-mandated AIDS advisory councils; and, as so modified, affirmed.

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF ALBANY

NEW YORK STATE SCHOOL BOARDS ASSOCIATION,

Plaintiff,

v.

THOMAS SOBOL, NEW YORK STATE COMMISSIONER OF EDUCATION, and the NEW YORK STATE BOARD OF REGENTS,

Defendants.

ORDER

Index No. 6657-89

HONORABLE DANIEL H. PRIOR, JR., J.S.C., Presiding

Plaintiff, having commenced an action alleging that the Regulations of the Commissioner of Education (8 NYCRR 135.3[b][2],[c][2] violate the First

Amendment of the United States Constitution;

AND defendants having appeared by its attorneys Robert Abrams, Attorney General of the State of New York, David Fruchter, Esq., of counsel and Robert E. Diaz, Counsel and Deputy Commissioner for Legal Affairs of the State Education Department, Karen Norlander, Esq., and Elizabeth Russell, Esq., of counsel;

AND plaintiff having appeared by their attorney Norman H. Gross, Counsel for the School Boards Association, Jay Worona, Esq., and Cynthia Plumb Fletcher, Esq., of counsel;

AND plaintiff having moved for an order granting summary judgment pursuant to Rule 3212 of the Civil Practice Law and Rules;

AND defendants having cross-moved for an order granting summary judgment upon the ground that said regulations do not violate the First Amendment of the United States Constitution;

NOW, upon reading and filing the complaint, verified June 28, 1989, with exhibits annexed; defendants' answer, verified August 21, 1989; plaintiff's notice of motion and memorandum of law, dated October 24, 1989; and defendants' cross-motion and memorandum of law, dated December 6, 1989, together with the affidavit of Robert Wright attached thereto; and due deliberation having been had thereon; and upon the decision of this Court dated April 2, 1990;

NOW, upon motion of Hon. Robert Abrams and Robert E. Diaz, attorneys for defendants, it is hereby

ORDERED, ADJUDGED AND DECREED that plaintiff's motion is denied; and it is further

ORDERED, ADJUDGED AND DECREED that defendants' cross-motion is granted; and it is further

ORDERED, ADJUDGED AND DECREED that the complaint is dismissed as against all defendants with prejudice.

Daniel H. Prior, Jr.

Justice of the Supreme Court

Dated: May 3, 1990.

Albany, New York

UNPUBLISHED

SUPREME COURT OF THE STATE

OF NEW YORK COUNTY OF ALBANY

NEW YORK STATE SCHOOL BOARDS ASSOCIATION,

Plaintiff,

v.

THOMAS SOBOL, NEW YORK STATE COMMISSIONER OF EDUCATION, and the NEW YORK STATE BOARD OF REGENTS,

Defendants.

MEMORANDUM DECISION

Supreme Court, Albany County

Motion Term, November 20, 1989;

December 18, 1989

Justice Daniel H. Prior, Jr., Presiding

(Motion # 01-09-020467)

APPEARANCES:

For the Motion: Norman H. Gross
Jay Worona
Cynthia Plumb Fletcher
Attorneys for Plaintiff

In Opposition
and for the
Cross-Motion: Hon. Robert Abrams
Attorney General of the
State of New York
David Fruchter, Esq.,
of Counsel
Robert E. Diaz
Attorney for Defendants
Karen Norlander, Esq.,
of Counsel

PRIOR, J.:

Plaintiff moves for Summary Judgment, pursuant to CPLR §3212, upon grounds that, as a matter of law, the

mandate imposed by New York State Education Commissioner's Regulation §135.3 (b) (2) and (c) (2) requiring school districts to include members of religious organizations on their AIDS Advisory Councils, is violative of the First Amendment of the United States Constitution. Defendants bring a Cross-Motion for an Order denying plaintiff's motion for Summary Judgment and granting Summary Judgment in favor of defendants on the ground that, as a matter of law, §135.3 (b) (2) and (c) (2) do not violate the First Amendment of the United States Constitution.

The two parties have stipulated that the instant action involves no disputed issues of fact other than the dispute on the First Amendment issue.

Upon lengthy examination of the parties papers in support and in opposition to their respective Motions, the conclusion must be reached that, as a matter of law, Commissioner's Regulation §135.3 (b) (2) and (c) (2) is not violative of the First Amendment of the United States Constitution. Therefore, the plaintiff's Motion for Summary Judgment is denied and defendants Cross-Motion for Summary Judgment, dismissing the Complaint, is granted.

Both parties correctly apply the three-prong test enunciated in Lemon v. Kurtzman, 403 US 602 (1971) for determining the constitutionality of legislation for purposes of the Establishment Clause. Defendants assert, and correctly so, that a fourth-prong or "political division" test is not to be

made a primary inquiry, except in cases involving financial aid to parochial schools. [Clayton v. Place, 884 F2d 376 (8th Cir. 1989)]. This three-prong test mandates that, in order to pass constitutional muster, legislation must:

1. Have a secular purpose;

2. Have a principal or primary effect that neither advances nor inhibits religion, and

3. Not foster an excessive government entanglement with religion.

The so-called "secular purpose" prong is not contested. Indeed, the purported purpose of the regulation is to provide broad based community input into the formation of AIDS programs. As both plaintiff and defendants agree, the education of school children regarding

this deadly disease is a legitimate - if not vital, legislative purpose.

The regulation also passes the second-prong of the test, appropriately labelled the "Primary effect" test. Any effect created by the regulatory mandate of advancing religion is "Incidental or remote". [Bowen v. Kendrick, 101 L Ed2d 520 (1988)]. Also, the advisory capacity of the council - contrary to plaintiff's belief, is a strong factor to be considered. While the regulation does require religious members on the advisory council, there is no similar requirement to accept the position of the council or its members. Specifically, the language classifies the duty of the Advisory Council as one of "making recommendations". It is similarly consistent with the secular purpose of

the regulation that such recommendations represent a broad based community opinion - all in the interest of health education.

For reasons similar to those already mentioned, the regulation also passes the third or "excessive entanglement" prong of the Lemon, supra test. Plaintiff's reliance upon Aguilar v. Felton, 473 US 402 (1985) is misplaced. Aguilar, supra involved federal monies and the inherent oversight responsibility that often attaches. Similar monetary expenditures and the oversight required simply do not exist in the present situation. Plaintiff's reliance upon other cases is similarly unpersuasive.

Papers to attorneys for defendants to submit Order on informal mail Notice.

A copy of this Decision is to be attached thereto.

Dated: April 2, 1990 at

Albany, New York

Daniel H. Prior, Jr.
Justice of the Supreme Court

STATUTORY AND REGULATORY PROVISIONS

8 NYCRR § 135.3. Health Education.

(a) Provision for health education. It shall be the duty of the trustees and boards of education to provide a satisfactory program in health education in accordance with the needs of pupils in all grades. This program shall include, but shall not be limited to, instruction concerning the misuse of alcohol, tobacco and other drugs.

(b) Health education in elementary schools.

(1) The elementary school curriculum shall include a sequential health education program for all pupils, grades K-6. In the kindergarten and primary grades, the teacher shall provide for pupil participation in planned

activities for developing attitudes, knowledge and behavior that contribute to their own sense of self-worth, respect for their bodies and ability to make constructive decisions regarding their social and emotional, as well as physical, health. Personal health guidance shall also be provided according to the individual needs of pupils. This guidance shall include the development of specific habits necessary to maintain good individual and community health. In addition to continued health guidance, provision shall be made in the school program of grades 4-6 for planned units of teaching which shall include health instruction through which pupils may become increasingly self-reliant in solving their own health problems and those of the group. Health education in

the elementary school grades shall be taught by the regular classroom teachers.

(2) All elementary school shall provide appropriate instruction concerning the acquired immune deficiency syndrome (AIDS) as part of the sequential health education program for all pupils, grades K-6. Such instruction shall be designed to provide accurate information to pupils concerning the nature of the disease, methods of transmission, and methods of prevention; shall stress abstinence as the most appropriate and effective premarital protection against AIDS, and shall be age appropriate and consistent with community values. No pupil shall be required to receive instruction concerning the methods of prevention of AIDS if the parent or legal guardian of such pupil has filed with the

principal of the school which the pupil attends a written request that the pupil not participate in such instruction, with an assurance that the pupil will receive such instruction at home. In public schools, such instruction shall be given during an existing class period using existing instructional personnel, and the board of education or trustees shall provide appropriate training and curriculum materials for the instructional staff who provide such instruction and instructional materials to the parents who request such materials. In public schools, the board of education or trustees shall establish an advisory council which shall be responsible for making recommendations concerning the content, implementation, and evaluation of an AIDS instruction

program. The advisory council shall consist of parents, school board members, appropriate school personnel, and community representatives, including representatives from religious organizations. Each board of education or trustees shall determine the content of the curriculum and approve its implementation, and shall be responsible for the evaluation of the district's AIDS instruction program.

(c) Health education in the secondary schools.

(1) The secondary school curriculum shall include health education as a constant for all pupils. In addition to continued health guidance in the junior high school grades, provision shall also be made for a separate one-half year course. In addition to continued health

guidance in the senior high school, provision shall also be made for an approved one-half unit course. Health education shall be required for all pupils in the junior and senior high school grades and shall be taught by teachers holding a certificate to teach health. A member of each faculty with approved preparation shall be designated as health coordinator, in order that the entire faculty may cooperate in realizing the potential health-teaching values of the school programs. The health coordinator shall insure that related school courses are conducted in a manner supportive of health education, and provide for cooperation with community agencies and use of community resources necessary for achieving a complete

school-community health education program.

(2) (i) All secondary schools shall provide appropriate instruction concerning the acquired immune deficiency syndrome (AIDS) as part of required health education courses in grades 7-8 and in grades 9-12. Such instruction shall be designed to provide accurate information to pupils concerning the nature of the disease, methods of transmission, and methods of prevention; shall stress abstinence as the most appropriate and effective premarital protection against AIDS, and shall be age appropriate and consistent with community values. No pupil shall be required to receive instruction concerning the methods of prevention of AIDS if the parent or legal guardian of such pupil

has filed with the principal of the school which the pupil attends a written request that the pupil not participate in such instruction, with an assurance that the pupil will receive such instruction at home. In public schools, such instruction shall be given during an existing class period using existing instructional personnel, and the board of education or trustees shall provide appropriate training and curriculum materials for the instructional staff who provide such instruction and instructional materials to the parents who request such materials. In public schools, the board of education or trustees shall establish an advisory council which shall be responsible for making recommendations concerning the content, implementation, and evaluation

of an AIDS instruction program. The advisory council shall consist of parents, school board members, appropriate school personnel, and community representatives, including representatives from religious organizations. Each board of education or trustees shall determine the content of the curriculum and approve its implementation and shall be responsible for the evaluation of the district's AIDS instruction program.

(ii) Boards of education or trustees that make condoms available to pupils as part of the district's AIDS instruction program shall:

(a) submit a condom distribution policy to the advisory council for appropriate recommendations;

(b) make condoms available only to pupils who participate in an appropriate AIDS instruction program as defined in this section;

(c) provide each pupil receiving condoms with accurate and complete personal health guidance as to the risks of disease that may result from the pupil's use or misuse of such product, which appropriately takes into account the child's age;

(d) assure that such personal health guidance is provided by health service personnel or school personnel trained and supervised by competent health professionals or health educators; and

(e) submit for approval by the commissioner a plan for the training of health service personnel, as

defined in section 136.1(c) of this Title, or school personnel who will provide such personal health guidance. Such plan shall be approved upon a finding of the commissioner that the training is adequate to prepare such personnel or school personnel to provide the required personal health guidance in an effective manner.

Supreme Court, U.S.
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No. 92-304

IN THE

Supreme Court of the United States

October Term, 1992

NEW YORK STATE SCHOOL BOARDS ASSOCIATION,

Petitioner,

against

THOMAS SOBOL, Commissioner of Education; the NEW YORK STATE BOARD OF REGENTS; and the NEW YORK STATE EDUCATION DEPARTMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

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(2337—LC7-112—1992)

Counterstatement of Question Presented

Whether the New York State Court of Appeals correctly held that regulations requiring the inclusion of religious representatives on public school AIDS advisory councils do not violate the Establishment Clause of the First Amendment to the United States Constitution, *U.S. Const. amend. I*, where such representatives serve in purely advisory capacities and where the purpose of the regulations is to reach as many students as possible, as early as possible, with accurate information about AIDS.

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No. 92-304

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

NEW YORK STATE SCHOOL BOARDS ASSOCIATION,

Petitioner,

against

THOMAS SOBOL, Commissioner of Education; the NEW YORK STATE BOARD OF REGENTS; and the NEW YORK STATE EDUCATION DEPARTMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

RESPONDENTS' BRIEF IN OPPOSITION

Jurisdiction

Petitioner has not fully satisfied Rule 24.1(e) of the Rules of the Supreme Court, requiring all briefs to set forth "the

time factors upon which jurisdiction rests." For the benefit of the Court, therefore, respondents set forth the following. On June 4, 1992, petitioner applied to this Court for an extension of time within which to file a petition for a writ of certiorari. Justice Thomas subsequently issued an order extending such time to and including July 29, 1992. Respondents received a petition for a writ of certiorari on July 28, 1992. On July 31, 1992, however, this Court rejected the petition pursuant to Rule 33.7 of the Rules of the Supreme Court. Petitioner submitted a revised petition, which respondents received on August 14, 1992.

The National School Boards Association (NSBA) has submitted an undated motion to appear as *amicus curiae* in support of the petition for a writ of certiorari. Respondents received NSBA's motion on August 28, 1992, and have opposed said motion in a separate document, pursuant to Rule 21.4 of the Rules of the Supreme Court and instructions from the Court.

This Court's jurisdiction is discretionary, under 28 U.S.C. §1257(a).

Summary of Argument

Respondents Thomas Sobol, the New York State Board of Regents and the New York State Education Department respectfully request that the Court deny the petition for a writ of certiorari, which seeks review of a decision of the New York State Court of Appeals holding that N.Y. Admin. Code tit. 8, §§ 135.3(b)(2) and (c)(2) do not violate the Establishment Clause of the First Amendment to the United States Constitution.

The decision below correctly upheld the regulations, finding no violations of the guidelines set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The decision is consistent with *Lee v. Weisman*, ___ U.S. ___, 112 S. Ct. 2649 (1992), and *Bowen v. Kendrick*, 487 U.S. 589 (1988), and with this Court's body of Establishment Clause jurisprudence. The issues have been fully and correctly resolved by New York's highest court. Review by this Court is therefore unnecessary.

Statement of the Case

This is a facial Establishment Clause challenge to regulations promulgated by respondents in response to the epidemic of Acquired Immune Deficiency Syndrome (AIDS).

Respondents are responsible for promulgating and implementing rules and regulations for the management of public schools in New York State. N.Y. Educ. Law §207 (McKinney 1988). In 1987, they approved regulations requiring, *inter alia*, AIDS instruction that is "appropriate" and "consistent with community values" as part of the sequential health education program for all elementary and secondary students. N.Y. Admin. Code tit. 8, §135.3 (1987) (hereinafter "the regulations"). Each local board of education is required to "establish an advisory council which shall be responsible for making recommendations concerning the content, implementation, and evaluation of an AIDS instruction program." *Id.* Each council must "consist of parents, school board members, appropriate school personnel, and community representatives, including representatives from religious organizations." *Id.* The role of the councils is purely advisory; responsibility for "deter-

min[ing] the content of the curriculum and approv[ing] its implementation" remains with the school boards. *Id.*

Petitioner, an organization of public school districts in New York, commenced the present action in Supreme Court, Albany County, on June 28, 1989. Petitioner challenged the requirement that advisory councils include representatives of religious organizations, contending that it violated the Establishment Clause of the First Amendment to the United States Constitution. U.S. Const. amend. I. Under the guidelines established by this Court in *Lemon v. Kurtzman*, 403 U.S. 602, *supra*, government enactments will be upheld against Establishment Clause challenges if they (1) have a secular purpose, (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) do not foster excessive government entanglement with religion. *Id.* Petitioner conceded the secular purpose of the regulations, but contended that they violated the second and third prongs of *Lemon*. The parties have stipulated that this action involves no disputed issues of fact, and that the only issue for judicial resolution is the facial constitutionality of the regulations.

The New York Supreme Court upheld the regulations, in a decision dated April 2, 1990. Relying on this Court's decision in *Bowen v. Kendrick*, 487 U.S. 589, *supra* (upholding, under the Establishment Clause, a Federal statute requiring applicants for certain grants to demonstrate how they would "involve" and "make use of" religious organizations in their proposed programs), State Supreme Court found that the primary effect of the regulations was not the advancement of religion. Any such advancement, said the court, was "[i]ncidental or remote," in view of the purely advisory role of the AIDS councils and the require-

ment that the councils include a broad spectrum of the local community as well as members of religious organizations. Nor, said the court, did the regulations foster an "excessive entanglement" of government with religion.

Petitioner appealed to the Appellate Division, Third Department. On June 6, 1991, that court declared that the regulations do not violate the Establishment Clause. The Appellate Division noted that the regulations obviously reflect respondents' "considered judgment that religious organizations," along with other members of the community, "can help solve the problem to which the regulation is addressed." Relying on *Bowen*, the Appellate Division noted that the Establishment Clause permits the State to "recogniz[e] that religion or religious organizations may have a role to play in resolving certain secular problems," and that any effect of the regulation on the advancement of religion was merely "incidental and remote." Like the court below, the Appellate Division emphasized that the function of the advisory council was solely "to make recommendations." Nor did the regulations foster an excessive entanglement of religion with secular matters, for, as the Appellate Division observed, the advisory councils

> perform an essentially secular role in representing the viewpoint of various large segments of the community, and there is no basis for assuming that those representatives [*i.e.*, of religious organizations] are not capable of carrying out their functions under the regulation in a lawful, secular manner.

Petitioner appealed to the New York State Court of Appeals (hereinafter the Court of Appeals), which on March 31, 1992, affirmed the Appellate Division's order. The

Court of Appeals emphasized the unprecedented threat posed by AIDS and the need for an early and vigorous response:

> In the context of the extremely sensitive, complex and escalating threat which society faces from AIDS—unless the broadest audience is reached as early as possible with the most accurate education program possible—it is particularly sensible for government to add the views of religious representatives on an advisory level to the predominant views it will receive from the rest of the community.

"Indeed," said the court, "by including and considering the views of members of the community who are affiliated with religious organizations," respondents guarantee that AIDS education programs will enjoy a "greater societal consensus and, therefore, greater secular effectiveness." Because the primary effect of the regulations is to advance the "rational, legitimate, educational and secular" goal of achieving "a more universal education program," the second prong of *Lemon* is not violated. Like the Appellate Division, the Court of Appeals found that any advancement of religion is "incidental," given the purely advisory role of the councils.

Nor, said the Court of Appeals, do the regulations lead to excessive entanglement with religion. The regulations neither entail "the ongoing monitoring and supervision" involved in financial aid regulations nor do they permit religious institutions to exercise "discretionary governmental functions." Noting that petitioner's challenge to the regulations is facial rather than as applied, the court dismissed as "entirely speculative" petitioner's suggestion that school boards might encounter excessive entanglement

in "sifting through the recommendations of the advisory councils to screen out those that may represent religious dogma." Similarly, the court found "speculative" petitioner's argument that the "need to choose representatives [for the council] from among many religious organizations" would entangle school boards in matters of religion.

REASON FOR DENYING THE WRIT

The decision of the New York State Court of Appeals is consistent with this Court's Establishment Clause jurisprudence.

A. *Lemon v. Kurtzman*

The regulations at issue were upheld below under the guidelines established by this Court in *Lemon v. Kurtzman*, 403 U.S. 602, *supra*. Petitioner concedes that the regulations have a secular purpose. The Court of Appeals agreed. *New York State School Bds. Ass'n v. Sobol*, 79 N.Y.2d 333, 339.

Respondents recognize that the effectiveness of AIDS education absolutely depends upon input from a broad cross-section of the community, including representatives of religious organizations. Specific reference in the regulations to religious representatives, as opposed to other segments of the community, simply reflects the reality that AIDS education compels frank discussion of highly sensitive issues which have religious implications. It is important to note that, under New York law, parents may withdraw their children from certain portions of AIDS instruction. N.Y. Educ. Law §3204(5) (McKinney 1981); N.Y. Admin.

Code tit. 8, §§16.2, 135.3. As the Court of Appeals observed,

> by including and considering the views of members of the community who are affiliated with religious organizations, the Commissioner ensures that the AIDS instruction that is eventually adopted will more likely enjoy greater societal consensus and, therefore, greater secular effectiveness.

By reducing the number of pupils who "opt out," the regulations enable a maximum number of school children to receive essential, accurate information about AIDS. The primary effect of the regulations, therefore, is neither to advance nor inhibit religion.

The regulations do not endorse religion. As this Court has observed, a conclusion that the regulations violate the Establishment Clause would require a determination that they are

> more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools . . . expenditure of public funds for transportation of students to church-sponsored schools . . . federal grants for college buildings of church-sponsored institutions of higher education combining secular and religious education . . . noncategorical grants to church-sponsored colleges and universities . . . tax exemptions for church properties . . . Sunday Closing Laws . . . release time program[s] for relig-

> ious training . . . and [] legislative prayers . . . *Lynch v. Donnelly*, 465 U.S. 668, 681-682 (1984) (citations omitted.)

The notion that the disputed regulations are somehow more an endorsement of religion than the permissible activities enumerated above is unfounded.

Respondents underscore, as well, that the regulations exist in an entirely secular context. While calling for the advisory participation of religious representatives, they also *require* the involvement of "secular" individuals: "parents, school board members, appropriate school personnel, and [other] community representatives." N.Y. Admin. Code tit. 8, §135.3(b)(2), (c)(2). Nor do the regulations create a symbolic link between government and religion. None of the dialogue between boards of education and their AIDS advisory councils takes place within the view of students. Nor is the results of such dialogue necessarily reflected in the classroom. The regulations do not constitute a joint exercise of authority, and cannot reasonably be said to create even the appearance of such an arrangement. Pursuant to the regulations, religious representatives simply join with other members of the educational community in providing *advice* to local boards of education. The school boards remain solely responsible for content and implementation of curriculum. In upholding the regulations, the courts below found these considerations compelling.

Petitioner's argument that the regulations violate *Lemon's* "excessive entanglement" prong is entirely speculative and without support in the record. Petitioner contends that the regulations run afoul of this prong by creating a process whereby school districts "might" have to choose represent-

atives from among several community religious organizations, and "might" have to screen inappropriate suggestions from their councils' religious representataives. These "as applied" arguments are factual in nature, however, and not subject to review in this facial challenge. *See, Immigration and Naturalization Serv. v. National Center for Immigrants' Rights*, ____ U.S. ____, 112 S. Ct. 551, 555 (1991).

B. *Lee v. Weisman*

The decision below does not conflict with *Lee v. Weisman*, ____ U.S. ____, 112 S. Ct. 2649, *supra*. *Lee* struck down the practice of permitting clergy to offer invocations and benedictions at public school graduation ceremonies. Finding such practice offensive to the Establishment Clause, the Court stated: "[t]he Constitution forbids the State to exact religous conformity from a student as the price of attending her own high school graduation." *Id.*, at 2660. The Court found the practice so deeply and manifestly offensive to the Establishment Clause that it decided the case "without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured," and thus declined "the invitation . . . to reconsider our decision in *Lemon v. Kurtzman*." *Id.* at 2655. Thus, petitioner's suggestion that *Lee* might support their argument is unfounded: the case does not elaborate on or alter the *Lemon* test. Indeed, *Lee* suggests that the regulations are valid, for it notes in conclusion that

> throughout the course of the educational process, there will be instances when religious values, religious practices, and religous persons will have some interaction with the public schools and their students. *Id.*, at 2661.

Bowen v. Kendrick

The decision below is also consistent with *Bowen v. Kendrick*, 487 U.S. 589, *supra*. Petitioner is mistaken in its contention that the statute under review in *Bowen* did not also *require* consultation with religious representatives. In *Bowen*, the Federal statute at issue, known as AFLA, authorized Federal grants for services and research in the area of premarital adolescent sexual relations and pregnancy. As this Court acknowledged, *id.*, at 603, 604, 607, AFLA specifically required applicants for funding to demonstrate how, using Federal grant money, they would "involve religious and charitable organizations" in their projects. *See*, 42 U.S.C. §300z-5(a)(21)(B). AFLA, said the Court, merely reflected "Congress' considered judgment that religious organizations can help solve the problems to which the [statute] is addressed." 487 U.S. at 606-7. This judgment was entirely permissible, and indeed "quite sensible;" its advancement of religion, if any, was "incidental and remote." *Id.* at 607.

The Court of Appeals' decision does not conflict with or "expand" *Bowen*. The issues addressed by AFLA and by New York's regulations are similarly sensitive and similarly complex. It was plainly permissible and "sensible" for respondents to conclude that the input of religious organizations would provide valuable assistance in coping with the unprecedented difficulties of AIDS prevention and education. Indeed, the participation of religious groups in New York's AIDS education programs is less likely than AFLA to advance religion, for AFLA required grant applicants to "involve" religious organizations directly in their programs, whereas the regulations mandate the participation of "representatives from religious organizations" only at the

advisory level. If, as this Court found in *Bowen*, AFLA's advancement of religion was only incidental and remote, and therefore did not violate the Establishment Clause, then the same must be true of New York's regulations.

The disputed regulations do not exclude anyone from memberships on an AIDS advisory council. To the contrary, the regulations strive specifically for the *inclusion* of all segments of the community in the war against AIDS. Petitioner's contention that religious organizations "enjoy greater participatory privileges than other community groups" (Petition, p. 13) is therefore mistaken. As the Court of Appeals stated:

> No hierarchy or preferential weight is established or ascribed in the regulations, and none can be inferred on this facial analysis. The mandatory list of participants on the councils includes "parents, school board members, appropriate school personnel, and community representatives, including representatives from religious organizations." There is no fixed over-all number of representatives or proportionate allocation or distribution among the categories . . . the challenged composition of advisory councils is not sufficiently likely to give rise to a perception that the government has favored or preferred religious over nonreligious groups. *New York State School Bds. Ass'n v. Sobol*, 79 N.Y.2d 333, 341, *supra*.

Citing *Bowen*, the court below found that, on the face of the regulations, respondents had successfully maintained " 'a course of neutrality among religions, and between religion and nonreligion.' " *Id.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: Albany, New York
September 3, 1992

Respectfully submitted,

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v.

Thomas Sobol, New York State Commissioner of Education, and the New York State Board of Regents,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

MOTION OF NATIONAL SCHOOL BOARDS ASSOCIATION TO APPEAR AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION OF
THE NATIONAL SCHOOL BOARDS ASSOCIATION
TO APPEAR AS AMICUS CURIAE
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

The National School Boards Association (NSBA) moves this Court for leave to participate as Amicus Curiae herein, for the purpose of filing the attached brief in support of the Petition for Writ of Certiorari. Petitioner has consented to the filing of the brief. Petitioner's letter of consent is on file with the Clerk of this Court. Respondents have been requested to consent, but consent has been refused.

NSBA is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members, who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

The decision below will be a precedent for allowing state boards of education and legislatures to mandate religion in the development of curriculum on any subject that the state believes is controversial.

School districts across the country are vitally interest in the particular subject involved in this case - HIV (human immunodeficiency virus) prevention education. If the decision below is allowed to stand it could seriously set back the efficacy of HIV

prevention education, thus limiting the only weapon we currently have against the disease.

The National School Boards Association urges this Court to grant it leave to present its views.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS

The National School Boards Association (NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands and the

Commonwealth of Puerto Rico. Founded in 1940, NSBA represents approximately 97,000 of the nation's school board members who, in turn, govern the schools attended by 97 percent of all U.S. public school children.

The decision below upholding a mandate of religious involvement in public school curriculum is a dangerous precedent for school districts across the country.

REASON FOR GRANTING THE WRIT

The decision below upholding the requirement of the involvement of religious leaders in public school curriculum development strikes at the heart of the principle of separation of church and state and threatens to embroil public schools across the country in religious battles over curriculum content in a variety of areas, including HIV prevention education programs.

ARGUMENT

Introduction

The New York Department of Education, in its zeal to satisfy the concerns of those whom the department apparently believed were the most vocal opponents of a somewhat controversial education program, is requiring all school districts in the state to develop HIV curricula with the cooperation of an advisory committee of educators, parents, one or more unidentified community representatives and at least one voice from a religious organization.

The same rationale propounded to justify the inclusion of religion on HIV curriculum committees can be used to justify giving religion a voice on every advisory committee involving textbooks, course offerings and other curriculum decisions. The legal precedent in this case reaches beyond HIV prevention education, and the arguments Amicus propounds herein regarding HIV curriculum would apply equally to any other public school curriculum. HIV curricula address a physical

health issue for children and youth. Other curricula address their academic health.

This is not to minimize the importance of HIV education. Until a cure or vaccine for HIV infection is discovered, our only protection is to teach people, particularly young people, how to avoid contracting it.

Even though the regulation at issue here is apparently the only state regulation of its kind at this time, Amicus believes that the subject of this particular regulation and applicability of the legal principles involved herein are equally applicable to other public school subjects, beg for a decision by this Court even in absence of decisions in other jurisdictions.

I. The precedent in this case would allow a state to require religious representation on advisory committees for any school curriculum.

Although the subject of this regulation is HIV prevention, the principles involved in this case would apply equally to any other

curriculum subject. For example, over the years there have been many battles fought over the teaching of evolution in the schools. See, e.g., Epperson v. Arkansas,393 U.S. 97 (1968); Edwards v. Aguillard, 482 U.s. 578 (1987). Fundamentalist Christians have challenged reading textbooks because they teach witchcraft, idol worship, values relativity and other ideas offensive to their religious beliefs. Mozert v. Hawkins County Public Schools, 827 F.2d 1058 (6th Cir. 1987). Other religious organizations have argued that textbooks establish the religion of "secular humanism." Smith v. Board of School Comm'rs of Mobile County, 827 F.2d 684 (11th Cir. 1987) or the religion of "Witchcraft" or "Neo-Paganism." Brown v. Woodland Joint Unifed School District, No. Civ. S-91-0032 (WBS/PAN)(E.D. Calif. April 2, 1992). Still others charge that textbooks violate fundamental Christian values. Virgil v.

School Board of Columbia County, 862 F.2d 1517 (11th Cir. 1989).

A number of states, such as Texas and California, have state textbook selection committees. It is also quite common for school districts to have committees to review complaints about textbooks. If the precedent of the lower court decision is allowed to stand and the political clout of religious groups continues to strengthen, state departments of education and state legislatures will be encouraged to mandate the inclusion of religious representatives on statewide advisory committees for textbooks and local school district curriculum advisory committees.

Certainly such requirements would fly in the face of the Establishment Clause. But they are no different from the standpoint of the Constitution than the regulation at issue here.

The court below seems to have been swayed by the fact that the subject matter of the regulation is a deadly virus. As discussed further below, Amicus does not disagree with the importance placed by the lower court on HIV prevention education. But that fact does not justify violating the Constitution's ban against endorsement of religion by the State. Furthermore, the mandate in question is not only unconstitutional, it is ineffective.

II. The New York mandate jeopardizes the efficacy of its HIV prevention education program.

According to the federal Centers for Disease Control (CDC), as of June 30, 1992 there was a total of 230,179 cases of AIDS (acquired immune deficiency syndrome) reported in this country. HIV/AIDS Surveillance Report (July, 1992). CDC estimates that one in 250 persons in the U.S. is infected with the AIDS virus -- HIV. Public Health Service, America Responds to AIDS Campaign (1992). Relatively few, 872, of the AIDS cases involve 13-19 year

olds. However, 19 percent of the reported AIDS cases among males and 24 percent among females were diagnosed among people ages 20 - 29. Because of the long incubation period between infection with HIV and symptoms of AIDS, it is likely that many of these AIDS cases are the result of HIV infection acquired during the teenage years -- primarily from teenagers engaging in sexual intercourse and to a lesser extent from injection[1] drug use.

According to a report issued by the Select Committee on Children, Youth and Families, U.S. House of Representatives, A Decade of Denial: Teens and AIDS in America, the number of teens with AIDS increased by more than 70% in the past two years, with AIDS being cited as the sixth leading cause of death among youth ages 15-24.

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[1] About 18 month ago, the CDC changed the terminology from "intravenous" to "injection" because not all needle use is intravenous.

The AIDS virus knows no borders. Just as people are free to travel from state to state, the virus also travels. This case arises out of the State of New York which has the most reported cases of AIDS in the country, several thousand above the state with the second largest number, California, and over twice the number of the next state, Florida. Centers for Disease Control, HIV/AIDS Surveillance Report (April 1992). There are a number of reasons for the high incidence of AIDS cases in New York unrelated to the effectiveness of its HIV prevention education program. Nevertheless, education continues to be the only weapon against HIV infection, and school districts across the country fear that the policy adopted by the New York Board of Education will irreparably damage the HIV prevention education program in New York, exposing other states to a growing pool of transient youth who are infected.

Inclusion of religious leaders may be educationally appropriate under some circumstances. See discussion under Point V. infra, at 16. In others it may not. There is simply no valid educational reason for a statewide requirement to include religious leaders in all public school advisory committees. The only reason for such a requirement is religious. If the reason for its adoption is religious, the mandate is by definition unconstitutional. Lemon v. Kurtzman, 403 U.S. 602 (1971); Lee v. Weisman, 60 U.S.L.W. 4723 (No. 90-1014)(U.S. June 24, 1992).

III. States across the country will follow New York's lead in this area, unless restrained by this Court.

Because of New York's leadership in the development of HIV prevention education programs, other states look to New York for model policies, procedures, curricula etc. If the decision below is allowed to stand, undoubtedly other state departments of

education and state legislatures will adopt similar requirements. The subject of this case is too important to delay a decision by this Court on the important constitutional issues. School districts will be forced by their state laws to include religious leaders on local committees and risk serious dilution of the effectiveness of the programs as well as entangling the schools with religion.

IV. HIV prevention education programs being developed in public schools across the country are essential to stopping the epidemic.

NSBA has been at the forefront of the fight against the HIV epidemic through its work in HIV prevention education in the nation's public schools.

In February, 1986 NSBA held the first national forum on AIDS and the public schools at which speakers such as Dr. Anthony Fauci, Director of the Institute of Allergy and Infectious Diseases at the National Institutes of Health and Dr. Harold Jaffe, chief of the

epidemiology section on HIV activity for the CDC, addressed education leaders from across the country. NSBA believed at the time it organized the forum, and continues to believe now, that the most effective way of stopping the epidemic is through education. The public health community is counting on our nation's public schools to play a significant role in educating young people about HIV and particularly about how to assess and reduce their risk of infection.

NSBA has covered the subject of AIDS and HIV in its resolutions since 1986. Most recently, its elected leadership readopted three resolutions at the NSBA annual convention in Orlando in April, 1992.

The first deals with the treatment of students and employees who are infected with the virus. NSBA resolution 5.3.14 reads as follows:

> NSBA believes that all local school boards should adopt policies for handling communicable and

> reportable diseases, including HIV (human immunodeficiency virus) infection and disease. NSBA encourages local school boards to develop an educational program for school staff, students, and community to provide factual information about HIV and its infectious risks as a means of combating people's fears and misconceptions about HIV. In drafting policies on communicable and reportable diseases, school boards must balance the need to protect the health of students and employees with the need to protect each individual's civil rights and privacy.

NSBA resolution 5.3.15 urges boards to develop curricula on HIV prevention.

> NSBA believes that all local school boards should adopt curriculum to educate students as to the causes and effects of HIV infection and disease and the means to prevent acquiring the infection. This education is best provided within the context of a comprehensive K-12 health education curriculum.

Finally, the third resolution, section 5.3.16, relates to intergovernmental cooperation and is aimed at finding solutions to the problem of all sexually transmitted diseases and student pregnancy.

> NSBA encourages school boards working cooperatively with superintendents, administrators, faculty, parents, students, and public health officials, to assess and define their roles and responsibilities in finding solutions to the increasing rate of childhood pregnancy and of HIV infection and other sexually transmitted diseases among youth.

Twenty-one states and the District of Columbia require some form of HIV education for students, according to a survey jointly conducted by the National Association of State Boards of Education and the Council of Chief State School Officers (May 1990). To help implement school-based HIV education, the CDC provides funding to all state education agencies, to five territorial departments of education, and to 16 local education agencies in cities with a high cumulative incidence of AIDS cases. In addition, the CDC funds 22 national organizations, including NSBA, to provide information and training to their constituencies which include school board members, school administrators, teachers, and

parents, to help schools implement effective programs of health education about HIV.

The CDC has developed a set of guidelines for school districts to develop curricula on AIDS and HIV. Centers for Disease Control, "Guidelines for Effective School Health Education to Prevent the Spread of AIDS." Morbidity and Mortality Weekly Report Supplement, Vol. 37, No. S-2, (January 29 1988). The guidelines provide that to be effective, prevention education must be developmentally appropriate and provide students the knowledge and skills to influence behavior. Only the local school board knows which members of the community will be effective in assisting the schools to develop curriculum which will be effective in influencing behavior.

V. HIV Prevention Education Programs will not succeed without parental support garnered through effective use of advisory committees, the membership of which is selected locally based on local needs.

Parental support is an indispensable ingredient in any effective education program. That is particularly true of HIV prevention education programs. Because HIV is spread primarily through sexual contact and sharing of needles, the program must necessarily involve sensitive issues which can be controversial. Certain religions oppose teaching young people about avoiding HIV infection through means other than abstinence from sexual intercourse and illicit drug use, e.g., knowledge and skills related to effective condom use. Thus, religious opposition is undoubtedly why New York chose to mandate representation of religious leaders on the committee. But the purpose of the advisory committees is to assist in making the HIV prevention curriculum more effective, not just to involve those who oppose the program.

A religious representative with some particular expertise in medicine or education might be called upon by a school district in

making the program more effective. A representative from a coalition of religious groups might also be an appropriate member of the committee. But, an across-the-board requirement of religious involvement does not make good educational sense. It is simply an attempt to placate religious leaders and certainly is not a secular requirement. It also has the primary effect of giving religion a favored status over all others and entangling the school district in matters of religion.

The CDC in the development of its guidelines recognized that community support for AIDS education programs is not developed by giving a voice to only one community group, whether that group is a religious organization, a minority group, a local medical society or any other organization. To be effective, the advisory committee or other devise used by the school board to achieve community input, must be chosen by the school

district based on local needs. Individual school boards that have decided to use representatives of religious groups on their advisory committees have done so not to assure that religious messages are included in the curriculum but to provide a forum for communication among all interested community groups and, in part, to educate the members of the committee. Religious representatives are also included because of their expertise in non-religious areas, such as because of their work with disadvantaged youth etc.

In June of 1989, NSBA conducted a survey funded by the CDC. HIV Prevention Education in the Nation's Public Schools, Report of the National School Boards Association Survey, February, 1990. The purpose of the survey was to get a national picture of school district HIV Prevention Education Programs and to ascertain the parental support for the programs. On the subject of the use of advisory committees, NSBA's findings from the

survey are in line with the CDC recommendations. The data indicate that parental support of HIV prevention education is directly related to the involvement of community members in the development of HIV prevention education programs, to the use of community advisory committees, and to the official adoption of curriculum by the local school board.

Fifty-nine percent of the districts responded out of the 568 districts surveyed, representing urban, large/suburban, and rural/small districts throughout the United States. The survey results showed that seventy-nine percent of respondent school districts require HIV prevention education for their students.

School districts reporting high parental support for their HIV prevention education program also reported that they had involved a variety of community members in developing or selecting the curriculum for the program.

Parental support may be positively affected by the inclusion of religious representatives on advisory committees but that does not validate New York's action in mandating inclusion of the representative solely because of their religious status.

As indicated above, Amicus does not oppose the inclusion of such representatives. But the HIV prevention education programs and advisory committees studied by NSBA in its survey were programs developed voluntarily by the school district, the members of the advisory committee were selected by the local school district in order to achieve local goals based on local needs. Religious representatives were not included merely to fill a "religious slot."

VI. The New York mandate will undermine efforts by local school boards to gain the necessary broad-based community support for effective HIV prevention education programs.

Although the regulation at issue here may allow a broadly-based committee, its only

mandate is that the voice of religious interests be heard.

The regulation does not require that the public health community, health educators, pediatricians or any other person with medical knowledge about the disease be included. This is absurd as there are serious public misconceptions about the manner in which the virus is transmitted and the effective ways to prevent its spread and an HIV curriculum developed without the assistance of health and medical advise cannot be effective. Attempts to gain support of the religious representatives for effective HIV education through the explanation of the health implications of AIDS is certainly not guaranteed by their mandated representation.

Citing Bowen v. Kendrick, 487 U.S. 589, 607 the lower court stated that "it is particularly sensible for government to add the views of religious representatives on an advisory level to the predominant views it

will receive from the rest of the community." It may indeed be sensible in some cases as long as the representatives are not representing religion, qua religion, with little relationship to any educational rationale.

The argument that religious groups should be included on advisory committees to insure "that the AIDS instruction that is eventually adopted will more likely enjoy greater societal consensus and, therefore, greater secular effectiveness" is a slippery slope. Certainly one reason for advisory committees in general is community acceptance. But community acceptance can be gained through other means than requiring committee membership of religious representatives, who come to the committee with no other qualification than their religious viewpoint. And, indeed, in some communities the mandated inclusion of religious organizations may assure the opposite result and set adherhents

to religions not represented against the committee.

There is a narrow line that must be traversed. In an attempt to gain wide public acceptance of the curriculum schools must take care that they accommodate, but do not endorse, religion. That is not only true because the U.S. Constitution prohibits it. It is true because it is educationally unsound to graft religious messages into the public school curriculum even to gain support for a very important educational program.

Although the New York law requires "community involvement" in addition to religious representatives, the only representative guaranteed a seat on the committee is that representing religion. This specific choice made by the regulation to acknowledge the importance of religious representatives above all others exclusive is not merely an accommodation to religion.

The lower court argues that it is

important to include religious representatives in order to assure a broad consensus of the community. But the New York regulation impedes effective consensus by virtue of its mandatory nature. When a religious group knows that it is favored by state regulations and has a right to a seat on the advisory committee rather than being there as an invitee of the school district to represent one of many segments of the community, the nature of the input is changed. The representatives are less likely to listen and more likely to dictate. See, e.g., New York Times January 12, 1991, for a story on the Roman Catholic Bishop of Brooklyn's refusal to lease two unused school buildings to the New York Public Schools to house 400 students in special education programs, because of the Bishop's objection to a sex education curriculum that would be taught in the schools which the Bishop believed could "conflict with what the church teaches."

Where the seat on the advisory committee is mandated, the school board has very little flexibility in dealing with intransigence of religious leaders. Instead of being a positive force to achieve the goals of the advisory committee, any group which has a guaranteed role as a community advisor can be an impediment to the development of an effective education program.

This court has stated on numerous occasions that local educational decisions should be left to local education officials. See, e.g., Wood v. Strickland, 420 U.S. 308 (1975) (the school board's interpretation of its own rules should control in a case brought under the due process clause); Bethel School Dist. No. 403 v. Fraser, 478 U.S. 534 (1986) (school board can determine whether student speech in an assembly undermines the school's educational mission); Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (school board has the right to determine content of

the curriculum if the actions are reasonably related to legitimate pedagogical concerns.)

Each community is different and the decision on whether, and how, to involve the clergy must be made on a local basis. Some larger communities have interfaith councils which can represent the religious community without appearing to favor one religion over another. Other communities may not have such councils and involvement of majority denomination represented in the community may send a message to members of minority religions that their faith is disfavored. See, e.g., Salt Lake Tribune, March 18, 1992, B1 for a story about the controversy over the Utah Board of Education's hiring of a Church of Latter Day Saints religion teacher to "infuse moral values into a sex education manual." Non-members of that faith objected that their views would not be represented in the manual.

This Court noted in its decision in Lee v. Weisman, supra, the "potential for divisiveness over the choice of a particular member of the clergy to conduct the [graduation] ceremony" at issue in that case. The mandate at issue here also paves the way for divisive conflict between the religious organization chosen for the mandated slot on the committee and those religious organizations which were not chosen.

CONCLUSION

Amicus recognizes that this Court is often reluctant to review a case involving a unique state law. However, the decision of the lower court sets a precedent for mandated involvement of religion in public school curriculum on every subject where religious leaders raise concerns. Advisory committees on school curriculum are common across the country, as are strong religious community concerns about the curriculum.

The fact that the committee in this case are advisory does not change the fact that school districts must pay them heed and in doing so jeopardize the integrity of the educational program and entangle school leaders with religion.

Amicus urges this Court to grant certiorari in this case.

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No. 92-304

IN THE

Supreme Court of the United States

October Term, 1992

NEW YORK STATE SCHOOL BOARDS ASSOCIATION,

Petitioner,

against

THOMAS SOBOL, Commissioner of Education; the NEW YORK STATE BOARD OF REGENTS; and the NEW YORK STATE EDUCATION DEPARTMENT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Opposition to Motion of National School Boards Association to Appear as *Amicus Curiae* in Support of Petition for Writ of Certiorari

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The motion of the National School Boards Association to appear as *amicus curiae* should be denied.

In July, 1992 the National School Boards Association (NSBA) sought respondents' consent to a motion to appear as *amicus curiae* in support of the petition for a writ of certiorari. Because NSBA was unwilling to share the con-

tent of its proposed brief, respondents refused consent. NSBA nonetheless seeks leave to file its brief—a request which, in light of respondents' refusal to consent, is not favored by the Court. Sup. Ct. R. 37.2.

NSBA's proposed brief, in any event, does not provide the Court with any new, relevant matter. Sup. Ct. R. 37.1. Indeed, the proposed brief burdens the Court by raising entirely speculative issues. NSBA attempts to argue that a decision on the merits of this case would affect other States. As NSBA admits, however, the regulations under review are the only ones of their kind in the United States. They are unique to the State of New York. Like petitioner, moreover, NSBA ignores the fact that the sole issue before this Court would be the *facial* constitutionality of the regulations. It is speculative, first, to assume that other States will adopt **similar** regulations. Were that to occur, further, a decision on the merits of this case would be relevant to other States only if they adopted regulations **identical** to those herein. The Court simply has no basis for concluding that other States will adopt similar or (even less likely) identical regulations.

Respondents respectfully suggest that, at the very least, the Court should postpone review of the issues herein until it has had an opportunity to determine if other States will, in fact, follow New York's lead. The "urgency" for review that NSBA perceives simply reflects NSBA's misunderstanding of the regulations. There is no evidence (nor could there be, on this facial challenge) that the participation of religious representatives on AIDS advisory councils somehow "damages" the public school AIDS curriculum. To the contrary, as upheld by the Court of Appeals, the regulations

currently in place ensure that, by reducing "opt outs," more students receive accurate AIDS education.

NSBA presents the Court with statistics and speculative arguments utterly unrelated to the facial constitutionality of New York's regulations. The few arguments that do address facial constitutionality have already been advanced by petitioner. Respondents respectfully request, therefore, that NSBA's motion to appear as *amicus curiae* be denied.

Dated: Albany, New York
September 3, 1992

Respectfully submitted,

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